programmers may offer more favorable terms to distributors. These are rational business decisions that should be permitted.

IV. The Commission's Rules On Exclusive Contracts Should Recognize Marketplace Realities

A. Exclusive Contracts Of At Least 7 Years Should Be Allowed For New Programming Services

Under the 1992 Cable Act, certain exclusive programming distribution contracts by vertically integrated programmers are permitted only if the Commission determines that the contract is in the public interest.[24/] In making its public interest determination, one of the factors the Commission is required to consider is the duration of the exclusivity portion of the contract.[25/] The Commission has proposed adopting a rule that would permit exclusive contracts for new program services if limited to two years, as a means of facilitating the launch of new programming options.[26/]

Continental's experience is that a two year period is not nearly long enough to adequately foster the development of new services. For example, New England Cable News, of which Continental is a 50 percent owner, has exclusive contracts with

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[24/] Section 628(c)(2)(D). This section appears limited to those markets where the programmer serves a cable system with which it is vertically integrated.

[25/] Section 628(c)(4)(E).

[26/] NPRM at ¶ 36.

several cable operators in the New England region. New England Cable News provides 24 hour a day coverage of issues of regional importance, including live coverage of breaking local and regional news not available on any other cable or broadcast outlet. This represents precisely the sort of innovative and public affairs-oriented programming that the Commission has traditionally sought to encourage.

However, after almost a year of operation, New England Cable News continues to lose money, with no immediate prospects for profitability.[27/] A limit of only two years on all exclusive distribution arrangements for new programming such as New England Cable News will cause some distributors to shy away from carrying untried but unique programming. Yet the long-term growth of fee revenues from distributors carrying the service is the key to its ultimate survival and success. At least a seven year start-up period is necessary to give a new service time to take root and to give the distributor an incentive to actively market the service, knowing that it will not be promoting the service for a "free rider" competitor for at least that time period.

B. In the Absence of Coercion, an Exclusive Contract Should be Presumed to be in the Public Interest

Section 628(c)(4) of the 1992 Cable Act lists several factors the Commission is required to consider when determining

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[27/] Year one start-up losses amount to nearly $6 million and year two losses are likely to approximate $5 million.

whether a particular exclusive contract is in the public interest. But it does not prohibit the Commission from considering other factors as well. In fact, under its primary mandate to regulate in the public interest,[28/] the Commission has the authority, and the responsibility, to consider all other relevant factors in making this determination.

The FCC has recognized that exclusive contracts can be beneficial to the public by encouraging investment in and promotion of innovative new programming services.[29/] In addition, where neither party to such an agreement has coerced the other into entering the contract, there should be a presumption that the contract merely reflects the free market incentives inherent in exclusive distribution arrangements and are in the public interest.

Congress recognized that coercion is the hallmark of exclusive contracts that are not in the public interest when, as discussed below, it required the FCC in Section 12 of the 1992 Act to issue rules that prohibit distributors "from coercing a video programming vendor to provide . . . exclusive [distribution] rights . . . as a condition of carriage on a

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28/ See Section 628(a) ("the purpose of this section is to promote the public interest, convenience, and necessity").

29/ Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 5009 (1990).

system."[30/] The Commission has stated its belief that this section, Section 616(a)(2), must be read together with Section 628(c).[31/] Continental agrees, but rather than limiting such a cross-reading of the statute to the importation of the public interest standards of Section 628(c)[32/] to Section 616(a)(2), the Commission should also take note of Congress' focus on coercion in Section 616(a)(2) and consider whether any such coercion existed in making its public interest determination under Section 628(c).

V. The Remedy Of Mandatory Carriage Should Only Be Granted Where A Programmer Makes A Clear Showing Of Unlawful Conduct By A Distributor, And Then Only In Rare Circumstances

Section 12 of the Act adds new Section 616(a), which requires the regulation of carriage agreements between distributors and programmers to prevent cable operators and other distributors from extorting a financial interest in a programming service as a condition for carriage, coercing a programmer to provide exclusive distribution rights, or discriminating in the selection or terms of carriage of programming which unreasonably restrains the ability of an unaffiliated programmer to compete fairly.

[30/] Section 616(a)(2) (emphasis added).

[31/] NPRM at ¶ 56.

[32/] The factors for determining whether a particular exclusive contract is in the public interest can be found at Section 628(c)(4).

Section 616(a)(5) requires the Commission to provide for remedies for violations of these restrictions, which must include the possibility of mandatory carriage by a distributor. The FCC seeks comment on what procedures should be adopted to implement the mandatory carriage remedy.[33]

As an initial matter, the statute requires the Commission to limit the applicability of mandatory carriage to only those situations where a violation of the restrictions contained in Section 616(a) has been demonstrated. The programmer has the burden of proof to demonstrate specific wrongful conduct under Section 616(a). Mere denial of a programmer's request for carriage, without a demonstration of any of the specifically identified wrongful conduct prohibited by Section 616(a), is not enough under the Act to warrant mandatory carriage of the programming on a distributor's system. Failure to make this explicit in the rules may well lead to needless controversy and expense.

In order to determine if a distributor has engaged in any such wrongful conduct, Continental recommends that the Commission look to consider the same factors that Congress listed in Section 628(c)(2)(B) that would justify programmers treating different distributors differently (e.g., creditworthiness, service offering, financial stability, character, and technical quality).

33/ NPRM at ¶ 58.

If a programmer is deficient in any one of these areas, the distributor's decision not to carry its services should be deemed presumptively valid and the remedy of mandatory carriage not available. The FCC, as noted above, recognizes that Section 616 must be read together with Section 628(c),[34/] and similar restrictions logically should have similar criteria applied to them.

A distributor must have the right to freely make business-based decisions on consumer preferences in determining carriage choices. If the Commission fails to properly limit the remedies under this Section consistent with its approach under Section 628, a distributor's decision on which programming to carry may be influenced more by its evaluation of which programmer is most likely to seek mandatory carriage if its programming is not carried rather than which programming best serves the needs of its subscribers.

A distributor must also have the right freely to make editorial decisions about which programming to carry. In this regard, the leased access provisions of Section 612 provide an alternate distribution mechanism for any programmer that the operator does not wish to carry or pay for carriage. The Commission's rules should make clear that, in the absence of the wrongful conduct enumerated in Section 616(a), as tested by the

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[34/] NPRM at ¶ 56.

same criteria as Section 628, distributors have the freedom to make their own judgments as to which programmers have the resources and experience to make a programming service a success, without fear of a disgruntled programmer being able to force itself upon the distributor.

Even in the face of wrongful conduct by a cable operator, the mandatory carriage remedy should be applied only in rare cases. For example, if a cable operator is proven to have coerced a programmer for exclusive distribution rights, the penalty of forced carriage without exclusive distribution may be financially far more severe than a fine, because the distributor will be promoting a service also carried by a competitor. Particularly given the substantial First Amendment problems with any forced speech by programming distributors,[35/] this remedy should be sparingly applied.

Conclusion

The nation has benefitted tremendously by the dynamic growth in diversity in programming choices available through cable television. Business relationships between cable programmers and

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[35/] See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1451 (D.C. Cir. 1985), cert denied, 476 U.S. 1169 (1986) (striking down on First Amendment grounds FCC rules requiring mandatory carriage on cable systems of local broadcast signals that were "explicitly designed to 'favor[] certain classes of speakers over others'" (cite omitted); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988) (again striking down FCC mandatory carriage rules on First Amendment grounds).

cable distributors are to a large extent responsible for that growth. To avoid poisoning the wellspring of this programming, the 1992 Cable Act's restrictions on such relationships should be limited solely to those instances where programmers or distributors are proven to have engaged in some identifiable improper conduct. Broad prophylactic rules that simply assume that such improper conduct exists will prove immediately and irreparably harmful to the television medium and to the television consumer.

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APPENDIX

CONTINENTAL CABLEVISION, INC.

PROPOSED FCC PROGRAM ACCESS RULES

1. <u>Definition of "Attributable Interest"</u>

For purposes of determining when a cable operator is vertically integrated with a satellite cable programming vendor or a satellite broadcast programming vendor, a cable operator will be deemed to have an "attributable interest" in such an entity when it possesses and exercises sufficient control over that entity such that it can cause that entity to hinder significantly or prevent other multichannel video distributors from providing programming to subscribers or consumers. For purposes of this determination:

a) in no case will a cable operator's interest be deemed attributable when an independent single person or entity holds a 51 percent or greater voting share in the satellite cable programming vendor or satellite broadcast programming vendor;

b) in no case will a cable operator's interest be deemed attributable when it holds only a limited partnership, non-voting stock or other interest that does not vest it with any voting control; and

c) a cable operator is permitted to demonstrate, regardless of its level of voting control, that it does not exercise sufficient control to enable it to exert undue or improper influence on the decisions of the satellite cable programming vendor or satellite broadcast programming vendor to have caused the act or practice alleged to have significantly hindered or prevented another multichannel video distributor from providing programming to subscribers or consumers.

2. <u>Factors to be Considered in Evaluating Price Differentials</u>

A vertically integrated satellite cable programming vendor or vertically integrated satellite broadcast programming vendor may consider any of the following factors in reasonably offering different prices for programming to different multichannel video distributors:

a) the distributor's actual penetration levels for the premium programming service;

b) the distributor's commitment to devote marketing resources to the promotion of the programming, or its prior experience in marketing other programming;

c) the markets served by the distributor;

d) the channel position on which the programming is placed on the distributor's system;

e) the size of the distributor's subscriber base, including economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor;

f) the prevalence of addressable converters in the distributor's system;

g) the retail price for the programming charged by the distributor to subscribers or consumers;

h) reasonable requirements for creditworthiness, offering of service, financial stability, character standards, or technical quality; or

i) the cost of creation, sale, delivery, or transmission of programming to the distributor.

3. <u>Exclusive Distribution Contracts</u>

Exclusive distribution contracts for seven years or less in duration shall be allowed for the marketing of new programming services. Such exclusive distribution contracts may be entered into within two years of the lauch of a new programming service. In the absence of a finding of coercion, exclusive distribution contracts shall be presumptively held to be in the public interest.

4. <u>Mandatory Carriage of Programming on a Distributor's System</u>

a) A distributor may not extort a financial interest in a programming service as a condition of carriage, coerce a video programming vendor into providing exclusive distribution rights, or discriminate in the selection or terms of carriage of programming which unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly. A violation of any of these restrictions shall be deemed not to have occurred if the distributor's actions were reasonably based on any of the factors enumerated in Section 2 above, or is pursuant to an exclusive distribution contract that is in the public interest.

b) The remedy of mandatory carriage on the distributor's system for a violation of any of the restrictions contained in Section 4(a) shall only be imposed if the Commission determines that other remedies available under this Act are insufficient in response to this violation. A distributor shall in all cases have the opportunity to make a showing that the remedy of mandatory carriage would be unduly punitive in the particular circumstances.

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